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Memorandum**

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to: Barry B. Shott
(Deputy Commissioner, LMSB (International))

from: Curt G. Wilson
Associate Chief Counsel (Passthroughs & Special Industries)

subject: Entity Classification of Liechtenstein Anstalts and Stiftungs

This Chief Counsel Advice is in response to your request for assistance. This advice may not be used or cited as precedent.

ISSUES

1. Whether a Liechtenstein Anstalt is properly classified as a business entity or trust for U.S. tax purposes?
2. Whether a Liechtenstein Stiftung is properly classified as a business entity or trust for U.S. tax purposes?

CONCLUSIONS

1. Based upon the information submitted, we believe that, subject to the facts and circumstances of each situation, Liechtenstein Anstalts generally are not properly treated as trusts under §301.7701-4(a) of the regulations because, in most situations, their primary purpose is to actively carry on business activities. Therefore, in most cases, Liechtenstein Anstalts are properly classified as business entities under § 301.7701-2(a).
2. Based upon the information submitted, we believe that, the classification of Liechtenstein Stiftungs must be determined on a case by case basis, dependent

upon the facts and circumstances of each case. Generally, however, Stiftungs will be classified as trusts, unless under the facts and circumstances, the entity was created primarily for commercial purposes.

FACTS

Liechtenstein Anstalts

Based upon the information you provided to us, an Anstalt, or Establishment, may be formed by either a natural or a legal person, known as a Founder. A person may form an Anstalt for himself, or for another party pursuant to a power of attorney or through a fiduciary arrangement. Founders are usually Liechtenstein attorneys or trust companies that protect the anonymity of the actual owner or beneficiary of the Anstalt. The Founder signs the Anstalt's articles. An Anstalt is established and achieves the legal personality when the Founder enters the Anstalt into the Register. To register, the Founder must submit the articles, the constitutive declaration, proof that capital has been paid in, and evidence that the official registration fees have been paid.

The Founder has the same powers with respect to the Anstalt that are generally attributed to shareholders in a company. The Founder also possesses "Founder's rights," which provide unlimited control and powers of administration (including the power to dismiss directors, distribute profits, or liquidate the Anstalt). The Founder may transfer the rights given him by law and by the articles, in whole or in part, to one or more assignees or successors. The Founder's rights may also pass through inheritance.

An Anstalt must have a Board of Directors (called a Board of Management or Administration) to represent it in its dealings with third parties. In most cases, the Founder will be a member of the Board. The Founder usually appoints the members of the Board for a term of three years, but may appoint for lesser or longer terms. The Board may consist of one or more natural or legal persons. At least one member of the Board, authorized to represent the Anstalt and conduct business on its behalf must have a registered office in Liechtenstien. This member must also be authorized to practice as a lawyer, trustee, or auditor, or have other qualifications recognized by the government.

The Board has power with respect to all matters that are not specifically reserved to the Founder. The Founder may give authority to the Board to exercise some or all of the Founder's rights. The Board may give signatory or agency authority to its own members, or to others, on behalf of the Anstalt. The Board may assign its management and executive responsibilities partially or completely to one or more of its members, or to third persons. In carrying out its management and representation functions, the Board must observe all limitations on its authority contained in the articles in instructions and/or regulations issued by the Founder.

The Anstalt's beneficiaries are those natural or legal persons designated by the Founder, or the person holding the Founder's rights, as entitled to receive the profits and/or liquidation proceeds of the Anstalt. The right to appoint beneficiaries is usually set forth in the articles and may be reserved to the Founder or granted to the Board or to third persons. If no beneficiaries are appointed, the Founder or his successors are presumed to be the beneficiaries.

The capital of an Anstalt is usually not divided into shares. Anstalts may hold patents and trademarks, hold interests in other companies, and may conduct any type of business except banking. If the articles permit the Anstalt to engage in commercial or industrial activities or a trade, the Anstalt is required to keep proper books and records as well as prepare annual financial statements. The liability of an Anstalt is limited to the extent of its assets. No personal liability extends to the Founder, the Anstalt's Board, or the beneficiaries.

You have indicated that in most situations you have seen, the primary purpose for the establishment of an Anstalt is to conduct an active trade or business and to distribute the income and profits therefrom to the beneficiaries of the Anstalt. You further indicated that the beneficiaries of an Anstalt are usually the previous owners of the business assets contributed to the Anstalt, and that in most situations the Founder acts as a nominee or agent of the beneficiaries in conducting the active trade or business of the Anstalt.

Liechtenstein Stiftungs

A Liechtenstein Stiftung, or Foundation, is a legal entity under Liechtenstein law. A Stiftung does not have members or a board of directors. The Founder transfers specific assets to the Stiftung that are then endowed for specific purposes. The assets pass from the personal estate of the Founder to the Stiftung. The Founder states the objectives of the Stiftung and appoints its administrators. Based upon information you have provided, a Stiftung cannot be organized to engage in the active conduct of a business, but Liechtenstein law provides that in certain cases commercial activities may be undertaken by a Stiftung if such activities serve its noncommercial purposes. A Stiftung may be a family foundation established to provide benefits to members of a designated family, or a charitable or religious foundation.

A Stiftung may be formed by filing a foundation charter or by will or testamentary disposition. A Stiftung is entered onto the Register in Liechtenstein and must have a minimum amount of initial capital. A Stiftung exists for the benefit of those named in its formation documents as being appointed as beneficiaries. A Stiftung only has legal liability up to the amount of its contributed capital and net assets and it cannot be made liable for liabilities in excess of them.

The Stiftung does not have a board of directors, but has Foundation administrators, called a Council of Members. The Founder may appoint himself as an administrator.

The duties and obligation of the administrators are set forth in the Stiftung's articles and includes the conduct of the Stiftung's affairs. This includes the investment and management of its assets and the distribution of income and/or capital to the beneficiaries as per the provisions of the Stiftung's articles. Under Liechtenstein law, the administrators are responsible for the proper management and conservation of the Stiftung's assets. The Founder may reserve for himself the right to discharge and appoint administrators.

LAW AND ANALYSIS

Section 301.7701-1(a) of the Procedure and Administration Regulations (regulations) provides that the Internal Revenue Code (Code) prescribes the classification of various organizations for federal tax purposes. Whether an organization is an entity separate from its owners for federal tax purposes is a matter of federal tax law and does not depend upon whether the organization is recognized as an entity under local law.

Section 301.7701-1(b) of the regulations provides that the classification of organizations that are recognized as separate entities is determined under §§ 301.7701-2, 301.7701-3, and 301.7701-4 unless a provision of the Code (such as §860A addressing real estate mortgage investment conduits (REMICS)) provides for special treatment of that organization.

Section 301.7701-2(a) of the regulations provides that for purposes of §§ 301.7701-2 and 301.7701-3, a business entity is any entity recognized for federal tax purposes (including an entity with a single owner that may be disregarded as an entity separate from its owner under §301.7701-3) that is not properly classified as a trust under § 301.7701-4 or otherwise subject to special treatment under the Code. Section 301.7701-3(b)(2) provides that except as provided in § 301.7701-3(b)(3), unless the entity elects otherwise, a foreign eligible entity is (A) a partnership if it has two or more members and at least one member does not have limited liability; (B) an association if all members have limited liability; or (C) disregarded as an entity separate from its owner if it has a single owner that does not have limited liability.

Section 301.7701-4(a) of the regulations provides that, in general, the term "trust" as used in the Code refers to an arrangement created by will or by an inter vivos declaration whereby trustees take title to property for the purpose of protecting or conserving it for the beneficiaries under the ordinary rules provided in chancery or probate courts. Usually the beneficiaries of such a trust do no more than accept the benefits thereof and are not the voluntary planners or creators of the trust arrangement. However, the beneficiaries of such a trust may be the persons who create it and it will be recognized as a trust under the Code if it was created for the purposes of protecting or conserving the trust property for beneficiaries who stand in the same relation to the trust as they would if the trust had been created by others for them. Generally, an arrangement will be treated as a trust under the Code if it can be shown that the purpose of the arrangement is to vest in trustees responsibility for the protection and

conservation of property for beneficiaries who cannot share in the discharge of this responsibility and, therefore, are not associates in a joint enterprise for the conduct of business for profit.

Section 301.7701-4(b) of the regulations provides that there are other arrangements which are known as trusts because the legal title to property is conveyed to trustees for the benefit of beneficiaries, but which are not classified as trusts for purposes of the Internal Revenue Code because they are not simply arrangements to protect or conserve the property for the beneficiaries. These trusts, which are often known as business or commercial trusts, generally are created by the beneficiaries simply as a device to carry on a profit-making business which normally would have been carried on through business organizations that are classified as corporations or partnerships under the Internal Revenue Code. However, the fact that the corpus of the trust is not supplied by the beneficiaries is not sufficient reason in itself for classifying the arrangement as an ordinary trust rather than as an association or partnership. The fact that any organization is technically cast in the trust form, by conveying title to property to trustees for the benefit of persons designated as beneficiaries, will not change the real character of the organization if the organization is more properly classified as a business entity under § 301.7701-2.

In Estate of Swan v. Commissioner, 24 T.C. 829 (1955), aff'd in part and rev'd in part on other grounds, 247 F.2d 144 (2d Cir. 1957), the court, in determining whether the value of the assets of the Stiftungs should be includable in the decedent's gross estate, considered the application of the federal estate tax under § 811(d) (now § 2036) to a Swiss Stiftung and to a Liechtenstein Stiftung and concluded that the Stiftungs were comparable to trusts for U.S. estate tax purposes, rather than corporations. Because the court concluded that the Stiftungs are comparable to trusts, the court held that the transfers to the Stiftungs in that case are encompassed by the broad statutory language "by trust or otherwise" in former § 811. Citing Morrissey v. Commissioner, 296 U.S. 344 (1935), in Estate of Swan, 24 T.C. at 859, the Tax Court further points out that the classification of a particular Stiftung must depend upon the nature of the activities carried on by the entity. In Morrissey, the Supreme Court concluded that the nature and purpose of a cooperative undertaking will differentiate a business trust from an entity that is an ordinary trust.

Anstalts

Based upon the information submitted, we believe that, subject to the facts and circumstances of each situation, Liechtenstein Anstalts generally are not properly treated as trusts under § 301.7701-4(a) of the regulations because, in most cases, their primary purpose is to actively carry on business activities. Further, Liechtenstein Anstalts are not subject to special treatment under the Code. Therefore, Liechtenstein Anstalts are generally classified as business entities under § 301.7701-2(a).

However, it is important to note that if the facts and circumstances indicate in a particular case that an Anstalt was created for the primary purpose of protecting or conserving the property of the Anstalt on behalf of beneficiaries, the Anstalt in such a case may be properly classified as a trust under § 301.7701-4. In such a case, it will be necessary to confirm that all of the elements of a trust are present: (1) a grantor, (2) a trustee that has legal title and a legal duty to protect and conserve the assets for the designated beneficiaries, (3) assets, and (4) designated beneficiaries. See Swan v. Commissioner, 24 T.C. 829 (1955), aff'd and rev'd on other grounds, 247 F.2d 144 (2d Cir. 1957). Accordingly, it is important to analyze the facts and circumstances of each Anstalt to determine whether a particular Anstalt was established primarily to conduct a trade or business or to protect and conserve assets for the designated beneficiaries of the Anstalt.

Liechtenstein Stiftungs

Based on the information submitted, we believe that, subject to the facts and circumstances of each situation, Liechtenstein Stiftungs generally are properly treated as trusts under § 301.7701-4(a) of the regulations. In most cases, the Stiftung's primary purpose is to protect or conserve the property transferred to the Stiftung for the Stiftung's beneficiaries and is usually not established primarily for actively carrying on business activities.

However, it is important to note that if the facts and circumstances indicate in a particular case that a Stiftung was established primarily for commercial purposes as opposed to the purpose of protecting or conserving property on behalf of the beneficiaries, the Stiftung in such case may be properly classified as a business entity under § 301.7701-2(a). Accordingly, it is important to analyze the facts and circumstances of each case to determine whether a particular Stiftung was established to protect and conserve property of the Stiftung or alternatively, was created as a device to carry on a trade or business.

Please contact Melissa Liquerian at (202) 622-3060 if you have any further questions.

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